

## **Fair Political Practices Commission**

### **MEMORANDUM**

**To:** Chairman Randolph and Commissioners Blair, Downey, Karlan, and Knox

**From:** Natalie Bocanegra, Commission Counsel  
John W. Wallace, Assistant General Counsel  
Luisa Menchaca, General Counsel

**Subject:** Adoption of Proposed Regulation 18709 – “Segmentation” Rules

**Date:** August 13, 2003

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### **I. SUMMARY**

Pursuant to Commission advice, where an official has a financial interest in a particular decision, the official is not prohibited from participating in other related decisions in which he or she does not have a financial interest, so long as the Commission’s “segmentation process” is followed. This process, which applies to all types of decisions, is viewed by staff as a viable approach for permitting participation by an otherwise disqualified official if certain requirements, as provided by proposed regulation 18709, are met.

The Commission has considered the language of the proposed regulation for pre-notice discussion at its June and August 2003 meetings. At the August meeting, the Commission examined three options relating to subdivision (b), which describes when decisions are “inextricably interrelated.” Option 2 was selected by the Commission and is reflected in this version of the proposed regulation 18709.

### **II. BACKGROUND**

The Political Reform Act (the “Act”)<sup>1</sup> prohibits a public official from making, participating in making or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. (Section 87100 et seq.) In general, a public official has a financial interest in a decision, resulting in a conflict of interest for the official, if it is reasonably foreseeable that the decision will have a material financial effect on the official, unless a particular exception applies. (*Ibid.*)

Where the decision in which the official has a conflict of interest is related to other decisions, it may become somewhat confusing as to how broadly the Act’s disqualification rules apply. As a result, Commission staff has developed a process to

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<sup>1</sup> Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

guide officials in determining whether they may participate in decisions in which the official is not disqualified.

### III. COMMISSION ADVICE

The Commission first introduced the idea that a public official might be able to participate in decisions related to a decision in which he or she has a financial interest in 1976 in its *Owen* opinion. (*In re Owen* (1976) 2 FPPC Ops. 77; see also memorandum to the Chairman and Commissioners regarding “Second Pre-notice Discussion of Proposed Regulation 18709 – ‘Segmentation’ Rules.”)

Commission staff has subsequently advised that an official may utilize a “segmentation” process to segment a decision in which he or she has a financial interest from other related decisions in which he or she does not have a financial interest.<sup>2</sup> The following advice is commonly provided to officials who have a financial interest in one of a series of decisions:

“...[u]nder certain circumstances, a public official disqualified from one decision may participate in other related decisions provided that the official’s participation does not affect the decision in which he or she has a conflict of interest. (*In re Owen* (1976) 2 FPPC Ops. 77.) However, certain decisions are too interrelated to be considered separately, and in that event, a public official’s conflict on one decision will be disqualifying for the other.

“Decisions are inextricably interrelated where, among other things, one decision is a necessary condition precedent or condition subsequent for another. Thus, a public official would have to disqualify himself or herself if the result of one decision would effectively determine or nullify the result of another. For example, in a decision to select one of two autopark sites, a decision to select one of the sites is essentially a decision against the other autopark site. (*Boogaard* Advice Letter, No. I-90-347.) Similarly, decisions regarding one aspect of a general plan may be so interrelated to other decisions that they may not be bifurcated, because one decision will effectively decide the other. (With respect to segmentation of decisions, see e.g., *Merkuloff* Advice Letter, No. I-90-542; *Lindgren* Advice Letter, No. A-99-313; *Sweeney* Advice Letter, No. A-89-639; *Stone* Advice Letter, No. A-92-133a; *Ball* Advice Letter, No. A-98-124; and *Ennis* Advice Letter, No. A-94-203.)

“Assuming that a decision can be logically segregated<sup>3</sup> from other related decisions, the public body must then procedurally segregate the

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<sup>2</sup> See *Huffaker* Advice Letter, No. A-86-343; *Patterson* Advice Letter, No. I-01-179; *Woodruff* Advice Letter, No. A-01-157; *Jackson* Advice Letter, No. A-01-056.

<sup>3</sup> As noted in prior memoranda, the Commission uses the terms “segment” and “segregate” interchangeably; “segmentation” and “segregation” describe the same procedure. “Bifurcation” is also

decision prior to allowing the public official with a related conflict to participate in the decision-making process. This entails three steps:

“(1) the decisions in which the public official has a disqualifying financial interest should be segregated from the other decisions on the public body’s agenda;

“(2) the decisions from which the public official is disqualified should be considered first, and a final decision should be reached by the public body without the disqualified official’s participation in any way; and

“(3) once a decision has been reached on the issues in which the official is disqualified, the disqualified official may participate in the deliberations regarding the other related issues so long as his or her participation does not result in a reopening of the previous issues or in any other way affect the decisions concerning the previous issues in which the public official was disqualified from participation.”

(*Woodruff, supra.*) (Footnote added.)

In essence, the purpose of the segmentation process is to allow an official to participate in certain decisions which may be “related” but continue to prohibit the official’s participation in decisions that are “inextricably interrelated” to one in which the official is prohibited from participating under the Act.

#### **IV. PROPOSED ADOPTION OF REGULATION 18709**

Staff believes that codification of the segmentation rules is useful since the segmentation procedure, frequently outlined in advice letters, would be more accessible to public officials. During the Commission’s Phase 2 Conflict of Interest Regulations Improvement Project, the segmentation issue was identified as an important issue warranting some examination. (Memorandum to the Commission regarding “Planning: Conflict of Interest Regulatory Improvement Project, Phase 2,” July 21, 1999.) However, due to the large number of other issues that required more immediate regulatory action, staff recommended that segmentation be assigned a lower priority, and no further regulatory work on this item occurred. Since that time, it has become apparent, particularly in light of recent consideration of general plan issues, that codification of and education on the segmentation process would be desirable.

As such, staff recommends adoption of proposed regulation 18709 (Attachment 1) which codifies Commission advice explaining how segmentation can be used as a tool to permit disqualified officials to vote on certain decisions in which they do not have a conflict of interest.

**Subdivision (a)** outlines the Commission’s segmentation procedure. Subdivision (a)(1) provides that only decisions which are NOT “inextricably interrelated” can be

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used, albeit less frequently, to refer to this procedure. The proposed regulation has been revised to use only the term “segment” or “segmentation” consistent with Commission direction.

segregated under the segmentation procedure. Subdivisions (a)(2) – (4) specify the steps which must be completed.

**Subdivision (b)** clarifies when decisions are “inextricably interrelated” and segmentation of the decisions cannot be applied. Several options for subdivision (b) were presented to the Commission at its August 2003 meeting. The Commission expressed a preference for Option 2, below:

“(b) For purposes of this regulation, decisions are ‘inextricably interrelated’ when the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision.”

This language was recommended by staff and is based on past Commission advice while omitting reference to the terms “condition precedent” and “condition subsequent,” included in a prior version of the proposed regulation.

**Subdivision (c)** codifies special rules relating to final decisions concerning an agency’s budget and general plan adoption or amendment decisions, provided the adoption or amendment applies to the entire jurisdiction.

Finally, the proposed regulation includes a comment stating that this regulation implements the segmentation principle outlined in the *Owen* opinion.

**Staff Recommendation:** Staff recommends adoption of proposed regulation 18709. Adoption of this regulation will make the segmentation rules more accessible to officials wishing to fully participate in governmental decisions before them while still allowing the officials to comply with provisions of the Act.<sup>4</sup>

Attachment:

Proposed Regulation 18709 – Attachment 1

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<sup>4</sup> If the Commission decides to adopt this language, staff will review regulation 18700, the “roadmap” regulation for the Commission’s conflict-of-interest rules, to determine if any additional regulatory changes are necessary to maintain conformity.